

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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5 In re:) Civil 05-MD-1708 (DWF/AJB)
6)
7 GUIDANT CORPORATION) STATUS CONFERENCE
8 IMPLANTABLE DEFIBRILLATOR)
9 PRODUCTS LIABILITY)
LITIGATION,)

10 This Document Relates)
11 To All Actions) 3:20 o'clock, p.m.
12) December 17, 2007
13) Minneapolis, Minnesota
14 -----

15 THE HONORABLE JUDGE DONOVAN W. FRANK

16 THE HONORABLE MAGISTRATE JUDGE ARTHUR J. BOYLAN

17 UNITED STATES DISTRICT COURT JUDGES

18 THE HONORABLE JUDGE WILLIAM LEARY

19 MINNESOTA STATE COURT JUDGE
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1 (In open court.)

2 THE HONORABLE JUDGE DONOVAN FRANK: Thank
3 you, Danielle. You may be seated.

4 Danielle was nervous announcing us because
5 the last time she -- I hope she won't mind me saying
6 this -- announced me, where were we? We were here, so
7 my calendar clerk didn't have to be here. And she
8 announced me as the Honorable Donald Frank.

9 And I actually thanked her for it. My
10 father, who is no longer living, he was neither a lawyer
11 or a judge, but I thanked her for honoring him because
12 she didn't know that was the name of my late father.
13 So, I am sure he would be proud he was introduced as a
14 Federal Judge in Minnesota. So --

15 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Off
16 the record.

17 (Discussion off the record.)

18 THE HONORABLE JUDGE DONOVAN FRANK: We can go
19 on the record.

20 Why don't we start with Plaintiffs first? We
21 are here for a status conference and to seek input from
22 counsel on the status, specifically, of what I will
23 refer to as a settlement or Master Settlement Agreement.

24 Maybe before we actually have Mr. Zimmerman
25 make any presentation to the Court, shall we just go

1 around the room and people can note their presence for
2 the record? We can start with your group, Mr.
3 Zimmerman?

4 MR. ZIMMERMAN: Yes, Your Honor, my name is
5 Charles Zimmerman. I am one of the lead counsel for the
6 Plaintiffs.

7 MR. LESSER: Good morning, Your Honor --
8 good afternoon, Your Honor. Seth Lesser, also a lead
9 counsel for the Plaintiffs.

10 MR. ARSENAULT: Richard Arsenault, Lead
11 Counsel Committee.

12 MR. HOPPER: Good afternoon, Your Honor,
13 Randy Hopper for the PSC.

14 MS. STRIKIS: Silvija Strikis for the PSC.

15 MS. FLEISHMAN: Wendy Fleishman for the
16 Plaintiffs. And I believe Ms. Cabraser is on the
17 telephone.

18 THE HONORABLE JUDGE DONOVAN FRANK: I am
19 really disappointed you said that, because I was going
20 to try to impress her by -- so we hadn't forgotten her,
21 Ms. Cabraser, we will note your presence for the record.

22 Would you like to do so, as well? Hello? I
23 thought she was on.

24 (Discussion off the record.)

25 THE HONORABLE JUDGE DONOVAN FRANK: We have

1 muted you, Ms. Cabraser, for the last five minutes.

2 MS. CABRASER: Well, it was probably all for
3 the good.

4 THE HONORABLE JUDGE DONOVAN FRANK: Do you
5 want to note your presence for the record before we move
6 on to other attorneys in the courtroom? The Plaintiffs'
7 lawyers as lead counsel have just introduced themselves.

8 MS. CABRASER: Okay, certainly. Elizabeth
9 Cabraser, Lead Counsel Committee. Thank you, Your
10 Honor.

11 THE HONORABLE JUDGE DONOVAN FRANK: I don't
12 believe you introduced Ms. Peterson from the -- go right
13 ahead?

14 MS. PETERSON: Elizabeth Peterson, Your Honor
15 from the Plaintiffs MDL.

16 THE HONORABLE JUDGE DONOVAN FRANK: And since
17 we have two representatives, here, who will be
18 officially -- by Order, they have been chosen by the
19 Court as the Claim Administrator. Since we have two
20 representatives here, why don't you note your presence
21 for the record before we go on to the counsel for the
22 Defendant?

23 MR. SIMMONS: Richard Simmons, Your Honor,
24 Analytics.

25 MR. BAUSER: Roger Bauser with Analytics.

1 SPECIAL MASTER JUNEAU: Your Honor, Patrick
2 Juneau, Assistant Special Master in the matter,
3 assisting Judge Boylan.

4 THE HONORABLE JUDGE DONOVAN FRANK: Mr.
5 Pratt?

6 MR. PRATT: Your Honor, Tim Pratt
7 representing the Guidant Companies. I want to say that
8 on behalf of the defense community, we have been trying
9 to mute Elizabeth Cabraser for many years. And I just
10 appreciate being a part of the process of getting it
11 accomplished today if only pleadingly.

12 MS. HOLLOWAY: Jean Holloway on behalf of the
13 Guidant Defendants.

14 MS. MOELLER: Debbie Moeller on behalf of the
15 Defendants.

16 MR. NELSON: Jeff Nelson on behalf of the
17 Defendants.

18 THE HONORABLE JUDGE DONOVAN FRANK: Mr.
19 Zimmerman?

20 MR. ZIMMERMAN: Tim, I have no mute button.

21 MR. PRATT: I know that.

22 MS. HOLLOWAY: We have been trying to find --

23 MR. ZIMMERMAN: But, you were trying to find
24 it, I know.

25 Charles Zimmerman for Lead Counsel, Your

1 Honor. It is a pleasure to appear before Your Honors,
2 Judge Leary and Judge Frank and Judge Boylan to formally
3 announce the finalization, execution and approval by
4 both sides of the aisle of the Confidential Master
5 Settlement Agreement.

6 I am not going to put the terms or conditions
7 on the record as it is a confidential document. And I
8 know we have spent a lot of time in ADR proceedings with
9 Magistrate Judge Boylan and Special Master Juneau
10 working this agreement out. But, this is the first time
11 we have been able to discuss it as a feta compli, as a
12 completed and executed document, and as one that now the
13 parties are adjoined together to implement and provide
14 as an opportunity for settlement of the 8,550 cases that
15 come within its purview.

16 We are excited to offer all Plaintiffs,
17 subject to this agreement, the opportunity to settle
18 their case within this agreement. We are excited
19 because we believe it is an excellent plan for resolving
20 this MDL and all of the cases contained within this MDL,
21 and also the cases that are in State Courts, most of
22 them in front of Judge Leary in Ramsey County in St.
23 Paul.

24 It was an agreement that was negotiated over
25 many months, and it is an agreement that has many terms

1 and conditions associated with it. But, the most
2 important condition is that it requires everyone to look
3 at it, see if it fits their circumstances and to buy in
4 on it on an individualized basis.

5 There will be published a timeline for
6 counsel and for clients to review the terms, receive
7 their allocation amount, and decide if the terms and the
8 allocation amount is satisfactory to them given their
9 individualized circumstances.

10 That there will be a website available to
11 people to review the generalized plan, the generalized
12 timeframes, and the various forums to download and to
13 review and execute. But, the actual document, the
14 actual plan of allocation, the actual settlement
15 agreement is a confidential matter, but only as to the
16 public. And any lawyer who has a case within the 8,550,
17 any client who has a case within the 8,550, of course
18 this information will be totally available to them and
19 totally accessible for their review.

20 The fact of the matter is, Your Honor, that
21 the resolution of mass torts requires a lot of work. It
22 requires a lot of consideration of various interests and
23 various responsibilities from both sides of the aisle.
24 And this case came together, although it doesn't seem
25 like it, it did come together in record time. We are

1 less than two years or approximately two years into this
2 process. And here we are before Your Honor offering a
3 total resolution of 8,550 cases that have come under
4 your jurisdiction and under the jurisdiction of Judge
5 Leary and other jurists around the country.

6 So, it is a proud moment for all concerned.
7 We congratulate Guidant and its companies, Boston
8 Scientific and their counsel, for making this a reality.
9 We congratulate the Plaintiffs Steering Committee and
10 the Lead Counsel for taking a leadership role in getting
11 this resolution to where we are today. And we thank
12 very much the Court for its guidance and support through
13 what has been a very interesting and important
14 resolution of a complex mass tort and medical device
15 matter.

16 So, without saying too much more, Your Honor,
17 I guess I will sit down and answer any questions that
18 the Court may have. We have spent time with the Court
19 in chambers reviewing the terms and conditions, and I
20 believe the Court will make some comments about the
21 settlement. But, at this time, I will leave it to
22 defense counsel to make any further comments.

23 THE HONORABLE JUDGE DONOVAN FRANK: Mr.
24 Pratt?

25 MR. PRATT: Well, Your Honor, this is long in

1 coming. It took a lot of effort over 15 months to get
2 to where we are today. We have a signed Master
3 Settlement Agreement. Over the course of 15 months we
4 debated among ourselves and with the Plaintiffs
5 negotiating committee lots of concepts, lots of details,
6 lots of different endgame strategies.

7 We ultimately ended up to where we are now
8 with a settlement of 8,550 claims, a settlement that my
9 client has deemed reasonable and in the best interest of
10 patients who use its products. And we are committed to
11 the idea that this is a global settlement that everyone
12 who is a potential participant ought to be encouraged
13 and indeed agree to participate in the settlement fund.

14 I agree with Mr. Zimmerman, this did not come
15 without some decent effort. I want to commend my
16 colleagues on the other side of the table. You know, we
17 go way back with Mr. Zimmerman and Mr. Arsenault in our
18 sessions with Judge Boylan.

19 Many other people became a part of the
20 process. It doesn't get done, a deal like this, without
21 a lot of open-mindedness, some element of patience,
22 certainly a high dose of persistence, and at the end of
23 the day an understanding of what is in the common
24 interest of all of the stakeholders in the litigation:
25 They, the Plaintiffs; me, the Defendant companies.

1 I think it is also fair and it is a good
2 symbol of it today that Judge Leary is here. These
3 things work when you get coordination between Federal
4 MDL Judges and State coordinating Judges, that has
5 happened. And we appreciate Judge Leary's participation
6 here today.

7 We've got good input and sign-off from
8 Plaintiffs who are heading up the proceedings before
9 Judge Leary, the consolidated proceedings in Minnesota.
10 We hope and expect that to continue at all levels. And
11 to you, Judge Frank, for sort of realizing this MDL
12 ought to be looked at as a potential endgame by
13 appointing Judge Boylan to be the ADR neutral in one of
14 your very first orders before anybody on either side or
15 anybody indeed in the courtroom had any interest in
16 talking settlement. And you set up a mechanism and a
17 process to get it done.

18 Certainly to Pat Juneau who came in a little
19 late, but worked hard to keep the people together. But,
20 I think as much as anybody, to Judge Boylan, who was
21 tireless, relentless, showed excellent judicial
22 demeanor -- except in those circumstances we deserved
23 otherwise. But, never let us go home. I mean that,
24 never let us go home in those instances where we
25 certainly felt that was something that we wanted to do,

1 something that we declared we were going to do, but we
2 didn't. And I think keeping us together, helping us
3 share the ideas, looking for opportunities for
4 compromise, if there is an architect of this, it is
5 certainly Judge Boylan.

6 On behalf of the Defendants, I commend Judge
7 Boylan for all of the work he put into that. And that
8 is all I have, Your Honor.

9 THE HONORABLE JUDGE DONOVAN FRANK: Mr.
10 Zimmerman, anything further?

11 MR. ZIMMERMAN: No, Your Honor, just my
12 gratitude for everybody who has participated in it. And
13 I join in Mr. Pratt's comments that it was truly an
14 effort that required everybody to seek new ideas and new
15 solutions and we did come up with them and we are very
16 proud of what we did.

17 THE HONORABLE JUDGE DONOVAN FRANK: What I
18 thought I would do is I will make a response, having
19 read the approximately 25-page agreement and the term
20 sheet or amended term sheet that preceded it, and having
21 spent the last -- since probably -- now the time is
22 roughly 3:35. We have been together, most of us, since
23 1:30 this afternoon. And this was set up to do just
24 this.

25 And I appreciate being provided a copy as

1 soon as the agreement was made. And I was actually
2 provided a copy, signed by all parties, yesterday. And
3 so I have had a chance to -- or over the weekend, so I
4 have had a chance to review it.

5 Let me say this, and then I will leave it to
6 the discretion, of course, of Judges Leary and Boylan on
7 how much they wish to say from where they see the case.
8 One of the criticisms, apart from this case, publicly of
9 class actions and specifically since this is not a class
10 action, multi-district litigation cases, somehow
11 individual plaintiffs get lost in the case.

12 And secondly, that there is a failure of
13 coordination between Federal and State cases. And so
14 then everybody gets swallowed up in one general Federal
15 case. Thanks to the lawyers on the Plaintiffs' side of
16 the aisle, the Defendant's side of the aisle, that
17 largest concern for a Judge like myself, although
18 ultimately responsible for not just moving a case and
19 treating the case with priority, which the lawyers on
20 both sides insisted on in this case, and appropriately
21 so. The largest concern has been addressed. And that
22 is, it is without any reservations that I recommend this
23 25-page settlement agreement and the options that it
24 gives to individual Plaintiffs, because it is a unique
25 case. Because it has, by my count, approximately 54

1 devices, and yet the settlement agreement has been set
2 up in such a way to give discretion not only to Judge
3 Boylan and Special Master Juneau, but to the Court so
4 that it is set up in such a way that I am confident that
5 it is not only fair, globally, but it is fair
6 individually to individuals Plaintiffs.

7 And I would actually go so far as to say,
8 looking at the case, because of the bellwether system,
9 representative trial system we use, there were a lot of
10 decisions early made in the case, in part because all of
11 the lawyers complied with the deadlines. There were
12 very few continuances. So, I know more about the case
13 than I would if it was more from the old days, so to
14 speak, a class action approach. And more and more we
15 see what you all agree to here, the bellwether trial
16 approach. I know more about the individual cases than a
17 judge typically would at this stage. So, I can say
18 honestly, and I would to each of the Plaintiffs if they
19 were here, that not only do I believe that they will
20 receive fair treatment if they opt in and participate in
21 this agreement, but I would make the observation that
22 they might get more fair treatment than if they stood
23 alone. Because many of these cases would be very
24 difficult for stand-alone cases, and they will have that
25 option. But, I think that was appropriately considered

1 by the lawyers, the lead lawyers for the Plaintiffs,
2 appropriately considered by Guidant.

3 And so, I believe that not only is the result
4 fair, globally, but the way it has been structured and
5 with the discretion given to the Court, the Special
6 Masters, Judge Boylan, that it gives an opportunity to
7 treat cases fairly, but yet individually, in a way that
8 balances the interests of the group as a whole, but each
9 individual Plaintiff standing on his or her own, and of
10 course Guidant Corporation.

11 So, I will recommend it. I believe it is not
12 only a fair settlement, but we now have a procedure set
13 up in place, and we will continue to give it priority,
14 so that we will move on a meaningful timeline and a
15 summary timeline will go up on a variety of websites.

16 We have appointed, and we will formalize that
17 by order, Analytics as a claim administrator. And one
18 reason they were selected -- there are a lot of great
19 claim administrators out there. One reason they were
20 selected was their immediate response to individual
21 questions by lawyers, plaintiffs, defendants and
22 clients, and also to proceed in a cost-effective manner
23 so that the most amount of money in the settlement can
24 reach the Plaintiffs individually in the case.

25 So, I am confident that with them on board in

1 the context of this agreement that we can proceed in all
2 due course.

3 And so, without any reservations whatsoever,
4 we will do our part, and I am hoping that the Plaintiffs
5 will review it carefully and opt into what I consider to
6 be a difficult 15 months, to the extent it has been a --
7 I believe I heard Judge Boylan say once or twice, he
8 doesn't recall a case where the lawyers and himself have
9 spent that much time on trying to work out the fine
10 details in the mutual best interests of all concerned.
11 And that is how I see the case, as well. And so, I am
12 proud to recommend it. And I will do my part on those
13 aspects of it in a timely way that are left to my
14 discretion.

15 I would like to say this before I see if
16 Judge Leary or Judge Boylan have anything to say. These
17 things don't happen in a vacuum. We are blessed in this
18 District with a talented Judge like Judge Boylan. And
19 he doesn't like it when people talk that way, but I
20 mean, it is true. It is accurate. And so, actually,
21 everybody has benefited, Plaintiffs and the Defendant,
22 from not only his extraordinary involvement in the case,
23 but also very cost effective when he is part of the
24 Federal Court.

25 So, he has worked countless hours on the case

1 and made the rest of us, I think, look better for it.
2 So, I appreciate that very much. And we work well
3 together as a couple of Judges who have known each other
4 for a long time. So, it has been my privilege to have
5 him on board, the two of us working together. Even
6 though it was the parties' agreement that first brought
7 Pat Juneau to the Federal Court here in Minnesota, I
8 would like to thank Pat for his work. The three of us
9 have been on the phone quite a bit more recently than in
10 the early months, but he has always made himself
11 available whenever I had questions, and I know Judge
12 Boylan feels the same way. So, I have had every reason
13 to believe that that is not going to change.

14 And then I would like to think I would behave
15 the same way with Judge Leary if I hadn't been a State
16 Judge for nearly 14 years before I came here in 1998.
17 But, I appreciate very much -- I have to maintain my
18 independence, he has to maintain his. But, yet, I think
19 we had the communication lines open so we could each
20 carry out our oath and responsibility, but yet we could
21 work together. Because I think the criticism of lack of
22 coordination between the Federal and State system
23 doesn't mean that everybody is always going to agree,
24 but it means that we were able to communicate and
25 coordinate. And I appreciate very much Judge Leary

1 being here and I appreciate that we have been able to
2 try to coordinate so we could do our job and the State
3 system through Judge Leary could do theirs.

4 And last, but of course not least, I would
5 like to thank all of the Plaintiffs' lawyers and the
6 lawyers for Guidant. Because, as you know, the MDL's,
7 at least in the Federal system -- and we are not done
8 yet, of course, but the MDL in the Federal system is the
9 only non-random assignment that a Federal Judge gets in
10 a case.

11 And I suspect that is true with Judge Leary.
12 He wasn't randomly assigned the case and forced to take
13 it. So when people asked me, well, if you didn't have
14 to take it, why did you? And I said, well, there are
15 probably many reasons. Two that come to mind is they
16 are very interesting cases. And with few, if any,
17 exceptions, you work with a very talented group of very
18 well-prepared lawyers. And so it makes it all kind of
19 worthwhile.

20 And so, probably enough said, and I hope that
21 we can carry on this success to get a 95 percent plus
22 participation rate and conclude the settlement with
23 payouts in the best interests of all parties.

24 Judge Leary?

25 THE HONORABLE JUDGE LEARY: I would like to

1 make just a few remarks. There has been some comment
2 with regard to cooperation of the courts. The level of
3 cooperation, to the extent there was cooperation in this
4 case, is really only out of the generosity of Judge
5 Frank.

6 I don't know how common it is for Federal
7 Judges to reach out to other judges from other
8 jurisdictions, particularly State Court jurisdictions,
9 but if there is a template or model for that, it
10 certainly is Judge Frank.

11 I don't know that anything more can be said
12 about Magistrate Judge Boylan's efforts. I probably
13 suspect that there aren't words adequate to really
14 summarize all of the hard work he has done. I do
15 attribute it to Judge Boylan's Chicago roots, which I
16 share, and I don't think he has forgotten them. But, it
17 has been a pleasure working with both of them.

18 Judge Frank is absolutely correct in terms of
19 why -- in terms of why I would accept an assignment like
20 this, it is because I did anticipate that I would be
21 able to work with very good lawyers. I will get back to
22 that in just a moment.

23 I do believe that this is a fair and just
24 settlement. I think that the parties have worked very
25 hard in getting to this point. I think it is a

1 settlement that both sides can be proud of. And we all
2 know that the ultimate test of whether or not we are all
3 right in that judgment will come from the participation
4 that does occur in this case. But, I am hopeful it is a
5 settlement that the public and those people who are
6 claimants in this case will understand as being fair and
7 equitable in all respects.

8 I have enjoyed the opportunity to preside
9 over the State Court litigation with regard to many of
10 the attorneys here. All of you are very handsomely
11 compensated. And for that a lot of times lawyers will
12 be criticized for that aspect; but, it doesn't change
13 the bottom line. The value of a lawyer is really in the
14 service that they present to their clients and to the
15 Court. And I think all of you have been models of the
16 highest form of professionalism and fairness that
17 lawyers can exhibit, and you deserve to be well
18 compensated for that.

19 With that, I want to thank you all, and I
20 look forward to seeing this matter concluded in the
21 middle of next year.

22 THE HONORABLE JUDGE DONOVAN FRANK: Thank
23 you, Judge Leary. Your Honor?

24 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Thank
25 you, Judge. Thank you for all of the kind words. First

1 of all, let me say that I have never settled a case. I
2 have been a Judge or a lawyer for over 30 years and in
3 all of those years in all settlement efforts, I have not
4 settled one, because I don't settle cases. I just
5 assist people in helping them settle cases.

6 And this was a tough, knock-down, no-holds
7 barred brawl in many respects. But, I also think that
8 it was very evident to me throughout the proceedings
9 that both the Plaintiffs' side, as well as the Defense
10 side had one overreaching goal, and that was to not
11 forget the patients, and the best interests of those
12 people who were clients or patients and who would use
13 the devices at issue.

14 I think the hard work of both sides and the
15 hard-fought battles resulted in a wonderful settlement
16 for thousands of people. And I would certainly join in
17 Judge Frank's comments about his review of the case,
18 review of the settlement, and his recommendations
19 concerning the same.

20 I think it is a fair and equitable
21 resolution of a very complex, legal and factual set of
22 circumstances that would be well to have each lawyer who
23 represents Plaintiffs take a real good look at and to
24 recommend to their clients.

25 And with that, I will not say anything

1 further.

2 THE HONORABLE JUDGE DONOVAN FRANK: We are
3 prepared to adjourn. And then if we need to get
4 together for a short time after, whether it involves us
5 or involves some contact between the claim administrator
6 folks and some of you; that is fine.

7 But, before we do that, on behalf of the
8 Plaintiffs, anything further, Mr. Zimmerman.

9 MR. ZIMMERMAN: No, Your Honor. Nothing
10 further.

11 THE HONORABLE JUDGE DONOVAN FRANK: Mr.
12 Pratt, on behalf of your client?

13 MR. PRATT: No, other than I express our
14 appreciation to the Panel for the kind comments.

15 THE HONORABLE JUDGE DONOVAN FRANK: Mr.
16 Juneau, anything further on your own behalf.

17 SPECIAL MASTER JUNEAU: No, sir. I think
18 that completes the record, Your Honor.

19 THE HONORABLE JUDGE DONOVAN FRANK: We are
20 adjourned. Thank you.

21 (Adjournment.)

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24 Certified by: _____

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Jeanne M. Anderson, RMR-RPR
Official Court Reporter